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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. GREGORY HANLEY, Defendant and Appellant.	B211507 (Los Angeles County Super. Ct. No. VA 104592)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dewey L. Falcone, Judge. Affirmed with directions.

Alex Coolman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

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Gregory Hanley appeals from a judgment of conviction after a bifurcated trial, in which a jury found him guilty of petty theft with a prior theft-related conviction and the court found true allegations he had suffered three prior strike convictions. Appellant contends (1) the trial court abused its discretion and violated his federal constitutional rights in denying his request for private counsel without inquiring the basis for the request, (2) the trial court erred by not addressing appellant's comments during trial as an implied *Marsden*[1] motion, and (3) the minute order recording his sentence should be corrected to delete a reference to Penal Code section 667.5, subdivision (b).[2] We disagree with appellant's first two contentions and therefore affirm the judgment; however, we agree that the clerical error in the minute order must be corrected.

FACTS

On February 21, 2008, appellant and a female companion went into Kohl's department store in Lakewood. Appellant went up to the fragrance counter and selected two fragrances. He put a bottle into each of the front pockets of his pants. Appellant and his companion then went to the intimates department, where the companion selected some underwear and appellant removed security sensors affixed to the fragrance bottles, returning them to his pockets. The two then headed toward the front of the store, and appellant's companion obtained a price check for the underwear at the register. They returned to the intimates department. Appellant's companion took a pair of panties from a hanger and concealed them in her purse. After making a brief detour to hand in the other underwear, appellant and his friend left the store. On their way out, they passed the front register and electronic article surveillance towers, which would have set off alarms if tripped by the hard tags the store placed on merchandise and soft tags placed on fragrances. The alarm system did not go off when appellant and his friend left the store.

Because the store sustained its biggest losses there, the fragrance counter was kept under 100 percent observation. Unbeknownst to appellant and his companion, their

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1 *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

2 All further statutory references are to the Penal Code.

actions were being observed by a loss prevention officer for Kohl's through store security cameras posted throughout the store. The security officer intercepted appellant and his friend on the sidewalk outside the store.[3]

The security officer testified at trial that he identified himself and told appellant "I need that fragrance from your pocket." Appellant removed a bottle of fragrance from his pocket and handed it to the security officer. Appellant and his friend voluntarily returned to the store, and the security officer escorted them to the loss prevention office. The security officer testified he asked appellant's companion to remove the panties from her purse, which she did, and then he asked appellant for the other bottle of fragrance. Appellant removed the second bottle from his pocket and handed it to the security officer. When questioned by the security officer, appellant admitted that he took the fragrances. He asked if the security officer was going to call the police. The security officer summoned sheriff's deputies.

At trial, the security officer testified the two bottles of fragrance had the value of approximately $50 apiece. A deputy sheriff testified that she responded to the Kohl's store after receiving information that two individuals were being detained in the loss prevention office for theft. After she advised appellant of his *Miranda*[4] rights, he indicated the companion was his girlfriend, he didn't have enough money to buy the items and he "just didn't believe he would get caught."

Appellant testified in his own defense. He testified that the videotape actually captured him placing his cell phone in his pocket. He stated he had dropped his cell phone on the floor and the videotape showed him replacing the batteries, which had fallen out, not removing any sensors. He admitted, however, that he did place a fragrance in his pocket when he was at the men's fragrance department. He testified he placed a

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3 The prosecution introduced into evidence a videotape compiled by the security officer from the store cameras depicting the activities of appellant and his companion on the store premises. The security officer related to the jury what he observed and narrated the videotape shown the jury.

4 *Miranda v. Arizona* (1966) 384 U.S. 436.

bottle of Curve fragrance in his pocket, but he "chickened out and got scared, went around the children's department, [and] withdrew it from [his] pocket." He denied giving the store security officer a bottle of fragrance outside the store, and he denied giving the security officer a second bottle after returning to the store. He further denied making any statements to the security officer or to the sheriff's deputy.

On cross-examination, appellant admitted he intended to steal the bottle of Curve fragrance and that he had suffered a prior theft-related felony offense 25 years before.

PROCEDURAL HISTORY

Appellant was charged with one count of petty theft with a prior theft-related conviction. (§ 666.) The information additionally charged that appellant had suffered three prior "strike" convictions under section 1170.12, subdivisions (a) through (d), and section 667, subdivisions (b) through (i).

Appellant pleaded not guilty and denied the allegations.

In a bifurcated trial, the jury trial found appellant guilty of petty theft as charged. After appellant waived a jury trial on the prior strikes, the court found the allegation of three prior strike convictions to be true. However, the court struck two of the priors in the interest of justice under *Romero*.[5] Appellant was sentenced as a second-strike offender to a total of four years in state prison, consisting of the midterm of two years doubled by the strike. The court imposed standard fines and fees and gave appellant credit for 73 actual and 36 "good-time" days of credit.

Appellant filed a timely appeal.

DISCUSSION

1. Continuance to Retain Private Counsel

On the day of trial, after the court and counsel discussed bifurcation of the strike priors, defense counsel told the court appellant "indicated to me that he would like additional time to continue this matter for two weeks so he can hire private counsel. He just wanted me to inform the court of his request." After confirming the request with

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[5] *People v. Superior Court* (*Romero*) (1966) 13 Cal.4th 497.

appellant, the court stated: "It's going to be denied. You know, we were together last week, and I've got 60 good jurors sitting outside. So the request to continue it for two weeks to secure private counsel will be denied."

Appellant contends the court's denial of his request to retain private counsel without inquiring into the basis for the request constituted an abuse of discretion and violated his federal constitutional rights to counsel and due process. We disagree.

As appellant notes, an appellate court reviews the denial of a request for a continuance of trial for an abuse of discretion. (*People v. Courts* (1985) 37 Cal.3d 784, 789.) A request for a continuance in connection with a request to retain counsel should be accommodated "to the fullest extent consistent with effective judicial administration." (*People v. Crovedi* (1966) 65 Cal.2d 199, 209.) A defendant has no *absolute* right to be represented by a particular attorney, but the court should make "all reasonable efforts" to ensure that a defendant who is financially able to retain an attorney of his own choosing be represented by that attorney. (*Id.* at p. 207.) However, a trial court may properly deny a request for continuance if the defendant is "'unjustifiably dilatory' in obtaining counsel . . . ." (*People v. Courts*, *supra*, 37 Cal.3d at pp. 790-791.)

In *People v. Courts*, the Supreme Court held a trial court abused its discretion when it refused to grant the accused a continuance to permit him to be represented by an attorney he retained approximately one week before trial. (*People v. Courts*, *supra*, 37 Cal.3d at pp. 795-796.) In *Courts*, the defendant had contacted a private attorney nearly two months before trial about substituting as his counsel in place of the public defender. Defendant then attempted to raise the funds necessary to retain the attorney, but the attorney left on vacation before the defendant succeeded in doing so. A week before trial, the public defender informed the court of defendant's efforts and requested a continuance so that the defendant could hire private counsel. (*Id.* at pp. 787-788.) The court denied the request. The defendant renewed his request on the day of trial, explaining private counsel was willing to take his case if he could obtain a trial continuance. (*Id.* at p. 789.) Reversing the judgment, the Supreme Court held the trial court abused its discretion because the defendant had exercised sufficient diligence to

secure counsel of his own choosing before the date of trial and had promptly apprised the court of his wishes at the earliest possible time. (*Id.* at pp. 795-796.)

In the present case, appellant showed no such diligence nor demonstrated his desire for a private attorney was anything more than just an excuse to postpone the trial. When appellant made his continuance request, the case was ready for trial, appellant was present and dressed for trial in civilian clothes, and the court and counsel had already gone over a "couple of issues" preparatory to calling the panel into the courtroom. There was no showing appellant had made the slightest effort to retain private counsel or had the financial means to do so. Without a showing of diligence and some concrete indication appellant's desire for private counsel went beyond a mere desire, the trial court properly exercised its discretion to deny the continuance.

2. Failure to Address "Implied Request" for Substitution of Counsel

After the prosecution rested in its case-in-chief and before appellant took the stand in his own defense, the court and counsel conferred about which prior convictions could be used to impeach appellant as a witness. At that point, appellant asked to address the court. When the court inquired what appellant wished to ask, he stated: "It is regarding this case. There have been motions he [the defense counsel] has not said, questions he has not said to the witness, sir, and I asked him to review my transcripts because the things the witness said now, and he's telling me no." The court replied, "Mr. Hanley, that's an issue I don't get involved in. That's between you and your attorney. I can't get involved in that."[6]

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6 The full colloquy was as follows:

"[Appellant]: I have a question about addressing the court. May I address the court about something else . . . ?

"The Court: I don't care. It's up to [defense counsel], but I don't care. Go ahead.

"[Appellant]: He always tells me no, sir.

"The Court: Well, what do you want to ask me?

"[Appellant]: I mean every time I ask -- this is my defense attorney, sir. This is my life.

In *Marsden*, the Supreme Court held that when a defendant seeks to discharge counsel and substitute another attorney on the ground of inadequate representation, the judge must allow the defendant to explain the basis for the motion and relate specific instances of the attorney's deficient performance. (*Marsden*, *supra*, 2 Cal.3d at p. 124; see *People v. Clark* (1992) 3 Cal.4th 41, 102-103.) Appellant contends his expression of concerns regarding his attorney should have been treated as a *Marsden* motion and the trial court, therefore, erred in not addressing the motion. This contention lacks merit.

A trial court has no duty to initiate a *Marsden* inquiry sua sponte. (*People v. Leonard* (2000) 78 Cal.App.4th 776, 787.) "A trial court's duty to conduct the inquiry arises '*only when the defendant asserts directly or by implication* that his counsel's performance has been so inadequate as to deny him his constitutional right to effective counsel.'" (*Ibid.*, quoting *People v. Molina* (1977) 74 Cal.App.3d 544, 549, italics added by *Molina*.) A defendant is not entitled to the discharge or substitution of a court-appointed attorney unless there is a sufficient showing the defendant's right to the assistance of counsel would be substantially impaired by denial of the request. (*People v. Clark*, *supra*, 3 Cal.4th at p. 104.) A defendant's "mere grumbling" over his counsel's perceived failures is insufficient to comprise either an express or implied request for the discharge of his counsel. (*People v. Lee* (2002) 95 Cal.App.4th 772, 780.) The mere fact defendant and his counsel have a difference of opinion regarding trial tactics does not place the court under a duty to hold a *Marsden* hearing. (*People v. Lucky* (1988) 45 Cal.3d 259, 282 ["we have never held that such a situation requires that defendant be

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"The Court: That is the relationship between you and your --

"[Appellant]: It is regarding this case. There have been motions he has not said, questions he has not said to the witness, sir, and I asked him to review my transcripts because the things the witness said now, and he's telling me no.

"The Court: Mr. Hanley, that's an issue I don't get involved in. That's between you and your attorney. I can't get involved in that. [¶] I'm going to bring the panel out, indicate that you're not going to make an opening statement [which counsel waived], and you will proceed with your first witness."

permitted new counsel, or that such a disagreement reflects a fundamental breakdown in the attorney-client relationship"].)

Here, appellant's comments to the court indicated no more than that he had a disagreement over trial tactics with his counsel. Appellant referred to "motions [counsel] has not said" and "questions [counsel] has not said" to a witness, and appellant complained about counsel not wanting to "review my transcripts" in relation to testimony given by the witness. These comments appear to be "mere grumbling" about a disagreement over trial strategy, and they fail to demonstrate any "fundamental breakdown in the attorney-client relationship." We disagree with appellant's contention that his comments achieve reversible significance when read in conjunction with his earlier request for a trial continuance to retain private counsel. Even viewed in context of his earlier request, appellant's complaints have no added impetus in evincing a request to discharge counsel. (*People v. Lucky*, *supra*, 45 Cal.3d at pp. 282-283.)

The present circumstances are distinguishable from cases on which appellant relies in which the courts have concluded the defendant was entitled to *Marsden* relief. (See, e.g., *In re Miller* (1973) 33 Cal.App.3d 1005, 1015-1019, 1021 [defendant clearly and unequivocally requested substitution of counsel, specifically alleging counsel failed to subpoena medical records and psychiatric records that would have some bearing on diminished capacity defense]; *People v. Groce* (1971) 18 Cal.App.3d 292, 295-297 [defendant informed court his counsel was refusing to obtain medical reports that might have impeached victim's credibility on crucial point and expressed his belief that counsel was not representing his best interests].)

3. Correction of Clerical Error

The minute order for the September 23, 2008 hearing recites that two of appellant's prior convictions were found to be true "within the meaning of . . . section 667.5[, subdivision] (b)." Appellant contends the reference to section 667.5, subdivision (b) is in error, because the information did not allege that appellant's prior convictions fell within the scope of section 667.5, subdivision (b), and the court made no reference to that section either in its discussion of the prior convictions or at sentencing. Respondent

concedes that no prior prison terms under section 667.5, subdivision (b) were alleged or found true.

When an order entered into the minutes fails to reflect the judgment pronounced by the court, the error is clerical, and the record can be corrected at any time to reflect the true facts. (*People v. Hartsell* (1973) 34 Cal.App.3d 8, 13; see *People v. Mitchell* (2001) 26 Cal.4th 181, 185; *In re Candelario* (1970) 3 Cal.3d 702, 705.) Respondent agrees the minute order should be corrected to reflect the actual judgment imposed by the court with respect to the priors. Accordingly, the minute order must be corrected to delete any reference to section 667.5, subdivision (b).

DISPOSITION

The judgment is affirmed, and the clerk of the superior court is directed upon remand to correct the minute order of September 23, 2008, by striking the erroneous reference to section 667.5, subdivision (b).

FLIER, J.

We concur:

RUBIN, Acting P. J.

BAUER, J.*

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.